

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
OFFICE OF ADMINISTRATIVE LAW JUDGES**

BEFORE THE ADMINISTRATOR

In the Matter of:)	
)	
Scranton Products, Inc., Hoffman)	
and Kozlansky Realty Co., LLC,)	Docket No. CAA-3-2008-0004
and Wyoming S & P, Inc.)	
)	
)	
Respondent.)	

**ORDER DENYING COMPLAINANT’S MOTION FOR DEFAULT ORDER
AND GRANTING MOTIONS FOR EXTENSION OF TIME AND TO FILE
SUPPLEMENTAL PREHEARING EXCHANGE**

I. Background

On October 22, 2007, the United States Environmental Protection Agency, Region III (“Complainant” or “EPA”), initiated this action against Respondents Scranton Products, Inc., Hoffman and Kozlansky Realty Co., LLC (“H&K”) and Wyoming S & P, Inc. (“Wyoming”) for alleged violations of National Emissions Standards for Asbestos, which were promulgated under the Clean Air Act. After unsuccessful attempts at settlement through Alternative Dispute Resolution, a Prehearing Order was issued on March 14, 2008, directing the parties to file prehearing exchanges. Thereafter, a settlement was reached with Respondents Scranton Products, Inc. and H & K, upon which a Consent Agreement and Final Order (“CAFO”) regarding those Respondents was executed and filed on March 13, 2008.

An Amended Prehearing Order directed Complainant to file its initial Prehearing Exchange on April 18, 2008, Wyoming to file its Prehearing Exchange on May 9, 2008 and Complainant to file its Rebuttal Prehearing Exchange on May 23, 2008.

EPA filed its Prehearing Exchange in a timely manner on April 16, 2008. However, Wyoming did not file any prehearing exchange by the due date. On May 15, 2008, an Order to Show Cause was issued, requesting Wyoming to show good cause on or before May 21, 2008 why it failed to submit its prehearing exchange on or before May 9 as required by the Prehearing Order and why a default order should not be entered against it.

On May 17, Wyoming sent by facsimile and mail, with a copy to Complainant, a letter to the undersigned stating that Wyoming is “not actively involved in asbestos work,” that it “does not have the financial resources to have an attorney,” and that its secretary works part time, and

requesting that its delay be excused.

On May 19, 2008, Complainant filed a Motion for Default Judgment and Memorandum in Support Thereof (“Motion for Default”) requesting that Wyoming be held in default and the proposed penalty be assessed against it, or in the alternative, that Complainant be granted a two week extension of time from the date Wyoming submits any prehearing exchange, to file its rebuttal prehearing exchange. In its Motion for Default, EPA states that Respondent has not filed a prehearing exchange, and points out that it sent a letter via facsimile and an e-mail to Wyoming’s president, Mr. Postupak, on May 15 indicating that EPA would move for entry of default judgment if Wyoming did not file it.

On May 20, Respondent sent by facsimile and mail to the undersigned a Prehearing Exchange. No certificate of service was attached to either the May 17 letter or the Prehearing Exchange.

On May 21, Complainant submitted a Motion to Submit Supplemental Prehearing Exchange, stating that it investigated Wyoming’s allegations regarding the role of Cerminaro Construction Co. (“CCC”) in removing asbestos, and that, subsequent to the filing of EPA’s Prehearing Exchange, CCC and International Asbestos Testing Laboratories (“IATL”) submitted responses to Complainant’s Information Requests. EPA seeks to supplement its Prehearing Exchange with these documents, and with an additional witness, the laboratory director for IATL, who “is related to the documents.” EPA asserts that these documents are relevant to violations alleged in the Complaint and requests in the Prehearing Order.

II. Discussion and Conclusions

A. Complainant’s Motion for Default Judgment

The Rules of Practice provide at 40 C.F.R. § 22.17(a):

[a] party may be found to be in default . . . upon failure to comply with the information exchange requirements of § 22.19(a) or an order of the Presiding Officer Default by respondent constitutes, for the purposes of the pending proceeding only, an admission of all facts alleged in the complaint and a waiver of respondent’s right to contest such factual allegations.

The Rules further provide that “[w]hen the Presiding Officer finds that a default has occurred, he shall issue a default order against the defaulting party, as to any or all parts of the proceeding unless the record shows good cause why a default order should not be issued.” 40 C.F.R. § 22.17(c).

Default and exclusion are harsh and disfavored sanctions, reserved only for the most egregious behavior. A default judgment is appropriate where the party against whom the

judgment is sought has engaged in willful violations of court rules, contumacious conduct, or intentional delays. *Forsythe v. Hales*, 255 F. 3d 487, 490 (8th Cir. 2001)(quoting *Fingerhut Corp. v. Ackra Direct Mktg. Corp.*, 86 F. 3d 852, 856 (8th Cir. 1996)). Default judgment “is not an appropriate sanction for a marginal failure to comply with the time requirements [and] . . . should be distinguished from dismissals or other sanctions imposed for willful violations of court rules, contumacious conduct, or intentional delays.” *Time Equipment Rental & Sales, Inc. v. Harre*, 983 F. 2d 128, 130 (8th Cir. 1993)(12 day delay in filing answer did not warrant entry of default). Moreover, Administrative Law Judges have broad discretion in ruling upon motions for default. Issuance of such an order is not a matter of right, even where a party is technically in default. See, *Lewis v. Lynn*, 236 F. 3d 766 (5th Cir. 2001). This broad discretion is informed by the type and the extent of any violations and by the degree of actual prejudice to the Complainant.” *Lyon County Landfill*, EPA Docket No. 5-CAA-96-011, 1997 EPA ALJ LEXIS 193 * 14 (ALJ, Sept. 11, 1997).

Respondent is technically in default for its failure to meet the May 9, 2008 filing deadline for its Prehearing Exchange. However, Complainant will not suffer any substantive prejudice due to the late submittal of Respondent’s prehearing exchange, particularly where, as here, Complainant will be provided additional time to file a rebuttal prehearing exchange. The Presiding Judge is charged with the responsibility not only to avoid delay, but also to conduct a fair and impartial proceeding. 40 C.F.R. § 22.4(c). It does not appear that Respondent willfully violated the Rules or Prehearing Order, or that it acted with contumacious conduct or using any willful delaying tactics. Entry of a default order is therefore not warranted. However, Respondent is hereby advised to strictly follow the Rules of Practice and instructions set forth in orders issued in this proceeding from this day forward, as such leniency may not be shown again in this proceeding. Respondent is also advised to follow the rules regarding filing and service of documents, and to include a certificate of service with each document filed, showing that he mailed the Regional Hearing Clerk the original document and that EPA counsel and the undersigned each have been sent a copy.

Accordingly, Complainant’s Motion for Default Order against Wyoming is denied.

B. Complainant’s Motion for Extension of Time to file Rebuttal Prehearing Exchange

Section 22.7(b) of the Consolidated Rules of Practice provides that an extension of time may be granted for filing a document upon timely motion, for good cause shown, considering any prejudice to other parties.

Respondent submitted its Prehearing Exchange to the undersigned on May 20, 2008, and Complainant’s counsel reported that she first received it on May 23. An extension of two weeks will not prejudice Respondent as a hearing date has not yet been set in this matter, and therefore the motion is granted.

C. **Motion to Submit Supplemental Prehearing Exchange**

Complainant correctly notes that a hearing date has not been set in this matter, and that it is not necessary to show good cause under 40 C.F.R. § 22.22 in order to supplement its prehearing exchange when a motion to supplement is filed more than fifteen days prior to a hearing. However, to prevent a party from waiting until sixteen days before a hearing to submit additional documents, names of witnesses, or an expanded scope of testimony, which can unfairly disadvantage the opposing party at the hearing, a motion to supplement a prehearing exchange is necessary, explaining the circumstances of submitting it after the prehearing exchange. Complainant has explained the circumstances. Wyoming should not be prejudiced by the supplemental prehearing exchange information EPA seeks to submit. Accordingly, EPA's Motion to Submit Supplemental Prehearing Exchange is granted.

ORDER

1. Complainant's Motion for Default Judgment is **DENIED**.
2. Complainant's Motion for Extension of Time to File its Rebuttal Prehearing Exchange is **GRANTED**. Complainant shall file any Rebuttal Prehearing Exchange on or before **June 10, 2008**. Any dispositive motions shall be filed no later than 30 days after Complainant submits its Rebuttal Prehearing Exchange.
3. Complainant's Motion to Submit Supplemental Prehearing Exchange is **GRANTED**.

Susan L. Biro
Chief Administrative Law Judge

Dated: May 23, 2008
Washington, D.C.